(3) Supreme Court, U.S.
FILED
No. 01 531 JUL 2001

IN THE
Supreme Court of the United States

FARM & GROVE REALTY COMPANY,
Petitioner

v.

BREVARD COUNTY, FLORIDA,
THE NATURE CONSERVANCY,
and KEVIN JUDD,
Respondents.

On Petition for Writ of Certiorari
to the Fifth District Court of Appeals
for the State of Florida

APPENDIX VOLUME II TO PETITION FOR WRIT OF CERTIORARI

Mark E. Tietig,
Counsel of Record
Lisa Kuhlman Tietig
Co-Counsel
Tietig & Tietig
6065 South Tropical Trail
Merritt Island, FL 32952
Telephone: (321) 452-9944

7790

INDEX TO APPENDIX VOLUME II

Seconded Amended Complaint (Case No. 96-14296) . . AII-2

Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment AII-20

Excerpt of Respondents TNC and Judd's Motion for Summary Judgment in Case No. 96-14296-CA AII-52

Excerpt of Respondents TNC and Judd's Memorandum of Law supporting their Motion for Summary Judgment AII-52

Excerpt from Respondent Brevard County's Motion for Summary Judgment AII-54

Excerpts from Petitioner's Initial Brief to the Fifth DCA in Appeal Number 99-2355 . . . . . AII-54

Excerpts from Petitioner's Initial Brief to the Fifth DCA in Appeal Number 00-649 . . . . . AII-59

IN THE CIRCUIT COURT IN THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

FARM & GROVE REALTY
COMPANY, a Florida Corporation, Case No. 96-14296-CA
Plaintiff,

v.

BREVARD COUNTY, a political
subdivision of the State of Florida;
THE NATURE CONSERVANCY,
a non-profit District of Columbia
corporation, as Independent Contractor
of Brevard County and Individually;
and KEVIN JUDD, as agent of The
Conservancy and individually,
Defendants.

_____/

SECOND AMENDED COMPLAINT FOR INVERSE CONDEMNATION FOR DAMAGES

Comes Now the Plaintiff, Farm & Grove Realty Company, a Florida Corporation; by and through its undersigned attorney, and brings this Second Amended Complaint against the
Defendants: BREVARD COUNTY, (The County) a political subdivision of the State of Florida; THE NATURE CONSERVANCY, (The Conservancy) a non-profit District of Columbia corporation, as Independent Contractor of Brevard County and individually; and KEVIN JUDD, (Judd) as agent of The Conservancy and individually, and says:

1. This is an action for Inverse Condemnation of lands located in Brevard County, Florida and for damages for violation of rights and for Illegal Restraint of Trade under the

Florida Constitution and Laws, under the U.S. Constitution and Laws; and especially the Fifth and Fourteenth Amendments thereto. The amount in controversy exceeds the sum of $4,500,000.00 exclusive of interest, costs and fees.

2. Plaintiff is a Florida corporation with its sole office in Brevard County. At all times pertinent hereto it was the owner and/or trustee with sole power of sale of the lots legally described in Exhibits A-i, A-2, and A-3 (The Lots). All references to Exhibits herein shall refer to Exhibits attached to Plaintiff's First Amended Complaint.

3. Defendant Brevard County is a political subdivision of the State of Florida. Defendant, The Nature Conservancy, is a Washington D.C. corporation with an office, and doing business in Brevard County. Defendant, Judd, is a resident of Brevard County and is employed by The Conservancy as the head of its Brevard County office.

4. Plaintiff acquired these lands in 1 981 from the original developer of a 6,700 lot subdivision known as Cape Kennedy Estates. Prior to, and at the time of acquisition by Plaintiff; all of The Lots were "buildable" and freely marketable as single-family, country estates under the then-existing ordinances of The County.

5. The Lots also were duly registered and qualified since 1968 under the Federal interstate Land Sales Act and under the Florida Land Sales Act. These registrations were required in order to allow sales of more than 50 lots and were invaluable because of subsequent changes in the Florida law requiring the installation of roads prior to sale which made it economically infeasible for any new subdivision to qualify; and, certainly, made qualification economically impossible for these scattered, mostly non-contiguous lots. Additionally, Plaintiff, as a real estate broker; was licensed under Chapter 475, Florida Statutes

and was subject to those laws and duties as well. Plaintiff's principal also was a licensed attorney in Florida and subject to the standards, rules and discipline of the Florida Bar.

6. Plaintiff's personnel were experienced and skilled in real estate sales and Plaintiff had a reasonable investment-backed expectation of a profit from its business of selling these lots to prospective buyers who wished to build their homes in this rural estate setting.

7. Plaintiff started its sales efforts in July of 1 981 and continued them thereafter successfully and dominantly in this market until finally stopped because of the actions of one or more of the Defendants as alleged hereafter.

8. In 1 991, the United States Fish and Wildlife Service (USF&W), the agency of the United States government charged with the enforcement and furthering of the goals of the Endangered Species Act of 1973 (Title 16 U.S. Code, Section 1 540 et seq), gave notice to Brevard County that The County could be considered responsible for any unpermitted violations of the Act occurring within its boundaries which might endanger the species or habitat of the Scrub Jay, a species of bird determined by USF&W to be threatened.

9. Responding to this potential liability, The County examined the various options it had under the Endangered Species Act. It rejected less extensive programs and chose instead to commence a series of actions to create a county-wide Mitigation Plan. This plan would result in an exemption for all lands within the County not included within The County's mitigation area.

10. One of these actions was the scientific designation of the critical "Core" areas where the scrub jays nested as well as the "Habitat" areas surrounding the "Core" area where these birds would visit for food and other activities. All of The Lots

which are the subject of this suit fall into the essential "Core" category. See Map, Exhibit B hereto.

11. Another event imposed by this course of action was the creation of a Scrub Jay Conservation and Development Plan (The Scrub Jay Plan). A copy is attached hereto as Exhibit C. All of The Lots herein were included in the "Core" areas designated in this Plan.

12. The stated policy of The County as to landowners such as Plaintiff was to take all of the "Core" area lands without allowing for variance, appeal, exception or other administrative remedy or relief from this designation and/or taking. This policy is contained in Subsections 5.5 and 5.6. of the Scrub Jay Plan, Exhibit C. It provides:

"5.5 Iterative risk analysis and Scrub Sanctuary system selection policy

> Section 8.0 describes the process by which scrub landowners outside the core may accept a voluntary mitigation assessment or offer their property to the SCDP for purchase. Landowners within the core will not be permitted to mitigate through the SCDP. but all will be offered fair market value for their land through the SCDP." (Emphasis supplied.)

"5.6 Scrub Sanctuary system acquisition policy:

> SCDP staff will ensure that sanctuary system lands are acquired according to the Brevard County Environmentally Endangered Land Acquisition Manual and applicable sections of Chapter 125. Florida Statutes. that govern land acquisition by county governments. In particular, acquisition negotiations will be based on land values developed by qualified M.A.I. appraisers approved by the Florida Division of State Lands. At least one appraisal must be ordered for

every property proposed for purchase. Properties valued in excess of $ 500,000 must have at least two appraisals. An extraordinary vote of the BOCC is required to approve purchase prices that exceed the average of divergent appraisals. When sanctuary acquisition occurs through joint participation with other agencies (such as the CARL program), additional appraisal requirements may be observed as necessary to comply with the policies of SCDP acquisition partners." (Emphasis supplied.)

13. The County, in furtherance of this taking plan, then, on April 26, 1993, entered into a Multi-Party Acquisition Agreement for Scrub Jay Refugia with the State of Florida, Division of State Lands, Department of Environmental Protection (State) to share the cost of acquisition of lands in these areas, including all of The Lots. A copy of that Agreement (The State Agreement) is attached as Exhibit D. Plaintiff, as owner of some of the lands to be acquired thereunder, is a third party beneficiary to the policies and procedures set forth therein.

14. The County then, for the purpose of keeping the land acquisition costs at a minimum, severely curtailed development in these areas by enacting supplemental and/or amendatory ordinances pertaining to the requirement for the installation of County-approved roads as a condition precedent to obtaining a house building permit. These supplemental enactments were for the specific purpose of halting road and home construction in these "Core" areas; thereby lowering the desirability and price of the land. These enactments were:

a) to deny the use of special tax districts (MSBU) which was the standard method throughout The County for installing local paved roads. This was the

only practicable means for the installation of paved roads in these areas. The use of this MSBU ordinance was denied to these "Core" area while remaining available to landowners throughout the County (See Exhibit E).

b) to completely deny roads to most lots by restricting unpaved roads to 1,320 feet in length (See Exhibit F); and,

c) to restrict the remaining unpaved roads of less than 1,320 feet, by economic means, by refusing to provide for their funding through a uniform, fair allocation of costs such as was contained in the MSBU ordinance thereby imposing an illegal and discriminatory tax and/or impact fee. (See Exhibit G.)

15. The Scrub Jay Plan, in its final form, was approved by the experts and committee members appointed by the County to this task. But, upon in formation and belief, it was not formally adopted by The County per the cautions of the County Attorney that such an adoption would be conclusive evidence of a taking and would be used by affected landowners to seek redress. Therefore, in an attempt to avoid a formal taking, The Scrub Jay Plan was de facto adopted by The County. The County then began implementing the provisions of the Plan; especially, by the use of its scientific findings which included Plaintiff's Lots in the "Core" areas and also as to the policies and procedures of The County in acquiring the lands.

16. As the result of this scheme, and the actions to implement it as related above, Plaintiff found that from and after October 1 8, 1994, Plaintiff could not sell any of The Lots without making full disclosure to potential purchasers that the lots could not be developed as homesites.

17. The only value of these mostly 1.5 acre lots was for

development of the site or a future home. Since the sole purpose of a prospective purchaser in buying one of these lots is to be able to build and occupy a home the market was killed by these actions of The County and Plaintiff was unable to make sales of any of The Lots and was deprived of its business, and all retail value and all substantial value of The Lots.

18. At all times the valuation of the lands to be acquired and the conduct of the Defendants pertaining thereto were controlled by national appraisal standards promulgated by The Appraisal Foundation entitled "Uniform Standards of Professional Appraisal Practice", ("USPAP"). These standards were further supplemented on the state level by "Supplemental Appraisal Standards" promulgated by the Florida Bureau of Appraisal, Division of State Lands, Department of Environmental Protection. A copy of those State standards and related official position papers are attached as Exhibit H.

19. In order to implement this program of land acquisition The County determined its own personnel did not possess the necessary expertise to negotiate for and acquire the lands. Therefore, it invited proposals from various entities to become The County's acquisition entity to administer this program.

20. In response to this request, Defendant, The Conservancy, submitted its proposal. See Exhibit I. See especially examples on Page 2 thereof where it extolls its expertise in purchasing lands at prices significantly below fair market value appraisals. This was reinforced by reference, Exhibit J, which further made much of the fact that The Conservancy was dedicated to and expert in a program of not paying just compensation. Such policies and conduct are contrary to law; and, if allowed by The County to be followed, would result in Plaintiff and other landowners being paid less than Federal and State Constitutions and Laws require.

21. The County knowingly and deliberately approved of these illegal plans and policies and hired The Conservancy as an Independent Contractor for this job based, in a major part, upon this illegal scheme. See Employment Contract, Exhibit K hereto. Therefore, all of the acts complained of herein took place under color of State law pursuant to an illegal conspiracy among the Defendants.

22. Defendant, The Conservancy, hired the individual Defendant, Kevin Judd, as its employee to work with and for The County in the performance of the Employment Contract in the advancement of this illegal acquisition program. The Defendants, The County and The Conservancy, specifically selected and/or trained the Defendant, Judd, to follow and promote these illegal methods.

23. Mr. Judd is a person who is well-educated and especially trained in land appraisal practices. Mr. Judd was at all times especially knowledgeable with regard to the just compensation provisions of the laws of the United States and of Florida as well as the State and The County acquisition policies contained in The State Agreement and well knew that these laws required the landowners to be paid fair market value for their lands.

24. Despite this knowledge of the law and despite the fair market value (Just Compensation) standards promulgated by USPAP and the Florida Supplemental Standards; Judd, for The Conservancy and The County, deliberately implemented the scheme of The Conservancy and The County and embarked upon a program of manipulation and deceit of landowners for the avowed purpose of denying them Just Compensation; thereby bringing glory, achievement and advancement to himself and to The Conservancy.

25. This illegal and improper course of conduct was

heartily promoted by The Conservancy and The County; and, in fact, was a central theme of self-glorification in the quarterly self-evaluations submitted by The Conservancy to The County and heartily endorsed by Dr. Duane DeFreeze, the County employee charged with coordinating The County's efforts with The Conservancy. See Exhibit L- 1 through L-7.

26. To further this scheme, Judd counseled and schemed with The County and its licensed appraisers who were hired by The County to value these lands. As the result, the appraisals were prepared contrary to the standards of USPAP, The Florida Supplemental Standards, good appraisal practice, the requirements of The State Agreement, The County Acquisition Policy set forth in the Scrub Jay Plan, the U.S. Constitution and, especially, the Fifth and Fourteenth Amendments thereto; the Florida Constitution and; especially, Article I, Sections 2, 9, and 25 and Article X, Section 6 thereof. These improper practices are exemplified by the FEDD appraisal, Exhibit M hereto, wherein numerous third party comparable sales were ignored. Only 5 sales, all ineligible under the aforementioned standards because they were conservation sales to The County under these same "chilled" and non-open market conditions, were taken as indications of value. This improper procedure resulted in a reduced valuation of $5,203.31 per acre.

27. These actions served to reduce the just valuation to a fraction of fair market value as evidenced by other open market sales made by Plaintiff and others in this area prior to the stopping of normal sales and killing of the market by the actions of The County described above.

28. To further reduce the lot price, and to obtain an unjust "windfall" of unpaid-for acreage to The County; The Defendants then deliberately disregarded the fact that almost every sale in the area was for a "per lot" price which required

that the appraisal be based upon "per lot" sales as required under the standards cited above. Instead, Defendants conspired to pay landowners on a "net acreage" basis, excluding the road and utility right of way. This was contrary to Federal and State laws and was done despite the fact that this would be a sanctuary area with no roads or utilities. Thus, for each inside lot, they were able to obtain 5,000 square feet of land without payment, a 7.58% reduction from the Just Compensation standard. For each corner lot the uncompensated amount was over 12,600 square feet or a 19% reduction from the Just Compensation standard even if Just Compensation was paid.

29. The Defendants further reduced the value of certain of The Lots by causing the improper designation of portions of The Lots as "Wetlands". This was despite the fact that these lots were in Florida longleaf or slash pine flatwoods with saw palmetto understory; deliberately contrary to the statutory definition contained in Section 373.019(17)F.S. Defendant made this into an outright misrepresentation by the mis-labeling of the wetland delineation on the survey to read "Florida DEP Jurisdictional Wetland". This illegal practice intentionally reduced the price paid as the offering price for wetlands was $500.00 per acre.

30. The Defendants well knew, from previous purchases from Plaintiff at higher prices, that all of Plaintiff's assets were represented by lots in Cape Kennedy Estates. They also knew that the business of selling these lots was practically Plaintiff's sole business. They knew that Plaintiff owed a large mortgage upon these lots and that by reason of the above actions by Defendants, the marketability of 100% of The Lots had been lost. Defendants also knew that by these same actions, 95% of the marketability of and the market for Plaintiff's remaining inventory of other lots in the same Cape Kennedy Estates

subdivision had also been destroyed. Defendants perceived this as a further opportunity to "squeeze" down Plaintiff on the price of The Lots.

31. The Defendants well knew that Plaintiff was the largest lot owner in this area and was the logical person to first deal with. However, they knew Plaintiff's principal's legal and real estate expertise would make a large discount unlikely. Therefore, Defendants refused to deal fairly with Plaintiff and put its lands "on the bottom of the pile" deliberately prolonging this taking so that the economic forces of the large mortgage, and continuing taxes combined with no sales would push Plaintiff into a precarious economic situation.

32. The Defendants, led by Judd, completely departed from their own improper appraisals and offered only 40% of the lowest comparable sale cited by all the improperly prepared appraisals. This was a practice specifically part of The Conservancy's training of Judd and designed to bring personal and financial glory to The Conservancy and Judd in demonstrating their powers of depriving landowners of their property for less than fair market value.

33. This scheme to pay less than fair market value and all of the above described actions were approved and endorsed by The County and became its custom, policy and practice.

34. Accordingly, on or about February 26, 1996, and pursuant to this conspiracy and the agreed course of custom, policy and practice, Defendants, through Judd, offered a purchase price of $2,000 per acre for The Lots in Exhibit A- 1. This price is less than 20% of Plaintiff's prior sales prices obtained in that area and less than 40% of Defendants' own valuation as evidenced by the FEDD appraisal. Such an offer is, per Se; conclusive evidence of bad faith, fraudulent conduct and abridgment of the rights of Plaintiff.

35. Despite Plaintiff's vehement protest at this offer the Defendants did not see fit to raise this price to fair market value but set upon a course of conduct to "freeze-out" Plaintiff by keeping the properties unmarketable, thereby bringing business failure and foreclosure upon Plaintiff.

36. Plaintiff has exhausted all of its administrative remedies and performed all necessary conditions precedent to the bringing of this action and each of the Counts set forth hereafter.

Count I

Inverse Condemnation

As Against Defendant, The County

37. As the result of the acts of Defendants as set forth above, Plaintiff's private property was taken by The County for a public use.

38. As the result of the acts of Defendants as set forth above, Plaintiff lost all economically viable use of its property.

39. As the result of the acts of Defendants as set forth above, Plaintiff's property was forced to bear a disproportionate burden of an obligation of the general public.

40. As the result of the acts of Defendants as set forth above Plaintiff lost all reasonable use of its property and its reasonable investment-backed expectation of profit.

41. The Lots have been taken by The County for public use without Due Process or Just Compensation as required by the United States Constitution and; especially, the Fifth and Fourteenth Amendments thereto.

42. As the result of the acts of Defendants recited above Plaintiff's properties have been taken by The County without Due Process or Just Compensation as required by the Constitution of the State of Florida and; especially, Article I, Sections 2, 9, and 25; and Article X, Section 6.

43. Plaintiff has exhausted all of its administrative remedies and performed all necessary conditions precedent to the bringing of this action.

44. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law, from defendants.

45. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays that this Court will enter its Order finding that Plaintiff's property has been taken by the above actions and will award a judgment against The County for Just Compensation together with interest, costs and attorneys fees.

Plaintiff further prays for such further relief as may be appropriate.

Count II

Damages Per Title 42 Section 1 983, et seq

As to All Defendants

46. Plaintiff had a federally protected right provided by the Unites States Constitution and especially the Fifth and Fourteenth Amendments thereto to Just Compensation for property taken by The County. The County had a clear and well-established duty to afford Plaintiff to provide Due Process and to pay Just Compensation for the lands of Plaintiff taken by it per the actions described herein above.

47. Plaintiff had a federally protected right as required by Federal Law; and, especially, Title 1 5 United States Code, Subsection 41 et seq to the enjoyment of its property rights which include the business of selling them. The Defendants and each of them had a duty to deal fairly with Plaintiff as to its business and as to refrain from any unfair methods of

competition; or any unconscionable, deceptive or unfair trade practices relating to their dealings with Plaintiff.

48. Plaintiff had a federally protected right to have its lands valued by federal appraisal standards promulgated by The Appraisal Foundation entitled Uniform Standards of Professional Appraisal Practice", (USPAP).

49. Despite these duties the Defendants, and each of them conspired together as described above to destroy Plaintiff's business of lot sales so as to make Plaintiff be forced to sell to The County. They further conspired to so "rig" the surveys, the wetlands determination, the acreage computation, the appraisals and the offering price as set forth above so as to force Plaintiff to sell at an illegal and inadequate price or face ruin.

50. All of these actions were taken under color of State law and in violation of Title 42 U.S.C., Section 1981 et seq.

51. As the result of Defendant's actions described above, the Plaintiff lost its right to Due Process and to Just Compensation as required by the U.S. Constitution and especially, the Fifth and Fourteenth Amendments thereto and its trade and business. Plaintiff has suffered damages as the result of the above action in an amount in excess of $ 4,500,000.00.

52. Plaintiff has exhausted its administrative remedies and performed all necessary conditions precedent to the bringing of this action.

53. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law and said statutes, from defendants.

54. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays for damages against the Defendants and each of them, jointly and severally, together with interest, attorney's fees and the costs of this action.

Plaintiff further prays for such further relief as may be appropriate.

Count III

Damages for Conspiracy

As to All Defendants

55. As required by the Constitution of the United States and the Fifth and Fourteenth Amendments, and Constitution of the State of Florida; and, especially, Article I, Sections 2, 9, and 25 and Section X, Article 6; the policies set forth in Articles 5.5 and 5.6 of the Scrub Jay Plan; the appraisal and valuation requirements specified in The State Agreement and in the Policy, and Page iii of the Florida Supplemental Appraisal Standards; The County had a clear and well-established duty to pay Just Compensation for The Lots of Plaintiff, whether taken or purchased.

56. As required by Federal Law; and, especially, Title 1 5 U.S. Code § 41 et seq, The Defendants and each of them, had a duty to deal fairly with Plaintiff as to its business and as to refrain from any unfair methods of competition; or any unconscionable, deceptive or unfair trade practices relating to their dealings with Plaintiff.

57. As required by Florida law; and especially, Chapter 501.201, The Defendants and each of them, had a duty to deal fairly with Plaintiff as to its business and as to refrain from any unfair methods of competition; or any unconscionable, deceptive or unfair trade practices relating to their dealings with Plaintiff.

58. At all times the valuation of the lands and the conduct of the Defendants pertaining thereto was controlled by federal appraisal standards promulgated by The Appraisal Foundation

entitled Uniform Standards of Professional Appraisal Practice (USPAP). These standards were further supplemented by Supplemental Appraisal Standards promulgated by the Florida Bureau of Appraisal, Division of State Lands, Department of Environmental Protection.

59. Despite these duties the Defendants, and each of them conspired together to destroy Plaintiff's business of lot sales so as to force Plaintiff to sell The Lots to The County at a lesser, illegal and inadequate price. They further conspired to so "rig" the surveys, the wetlands determination, the acreage computation, the appraisals and the offering price, all as specified above, so as to force Plaintiff to sell at an inadequate price or face ruin.

60. As the result the Plaintiff lost its right to Due Process and to Just Compensation as required by the U.S. Constitution and especially, the Fifth and Fourteenth Amendments thereto The Constitution of the State of Florida; and, especially, Article I, Sections 2 9, and 25 and Section X, Article 6; the policies set forth in Articles 5.5 and 5.6 of the Scrub Jay Plan; and its trade and business Plaintiff has suffered damages as the result of the above action in an amount in excess of $4,500,000.00.

61. Plaintiff has exhausted its administrative remedies and performed all necessary conditions precedent to the brining of this action.

62. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law and by said statutes, from Defendants.

63. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays for damages against the Defendants and each of them, jointly and severally, together with interest, attorney's fees and the costs of this action.

Plaintiff further prays for such further relief as may be appropriate.

Count IV

Illegal Monopoly and Restraint of Trade

As to All Defendants

64. The actions, in concert, of the Defendants pursuant to the conspiracy set forth above, were intended to and did eliminate all interest of the public in purchasing lots from Plaintiff. This was Plaintiff's business and it was ruined by such actions.

65. The Defendants by these acts killed the sales market as to area encompassing Plaintiff's Lots. Defendants well know that as the result thereof, the trade and commerce of Plaintiff would be destroyed thereby enabling Defendants to buy The Lots at a fraction of their value. As the result thereof, the trade as to the sale of The Lots was restrained to the point of market destruction and Plaintiff faces economic ruin.

66. Plaintiff has suffered damage as the result there of in an amount in excess of $ 4,500,000.00

67. Such acts are in violation of Sections 542.18 and 542.19, F.S. The injuries suffered were of the type meant to be protected thereby and were the direct result of acts of the Defendants proscribed by said statutes.

68. Plaintiff is entitled to treble damages pursuant to Section 542.22, F.S. against the Defendants, The Conservancy and Judd, jointly and severally. Plaintiff is further entitled to equitable relief against The County pursuant to Sections 542.21, 542.22, and 542.23, F.S.

69. Because of these actions, the Plaintiff has been required to employ the services of the undersigned attorney and has agreed to

pay a reasonable fee. The Plaintiff has further been required to pay for the costs of this suit. All of said fees and costs are recoverable, by law and said statutes, from Defendants.

70. Plaintiff demands trial by jury of all issues herein.

Wherefore, Plaintiff prays that this Court will enter its Order finding:

1. That the Defendants, and each of them, have embarked upon a course of conduct which violates the aforesaid statutes;

2. Award a civil penalty per Section 542.21 F.S. against Judd of $ 100,000.00;

3. Award a civil penalty per Section 542.21 F.S. against The Conservancy of $ 1,000,000.00;

4. Award treble damages per Section 542.22 F.S. against Judd and The Conservancy in an amount in excess of $ 13,500,000.00;

5. Enjoin County from continuing these illegal acts;

6. Award Court costs, attorneys fees and interest as provided by laws and said statutes; and

7. Award such other damage or relief as may be appropriate in the circumstances.

/s/_____

Edward C. Tietig, P.A.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

FARM & GROVE REALTY COMPANY — Case No. 96-4509 CAD

Plaintiff,

v

BREVARD COUNTY, a political subdivision of the State of Florida

Defendant

and

FARM & GROVE REALTY COMPANY — Case No. 96-14296 CAM

Plaintiff

v

BREVARD COUNTY, et al

Defendants.

_____/

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Edward C. Tietig, P.A.
FL Bar No. 081392
1326 Malabar Rd. S.E.,Suite 1
Palm Bay, Fl 32907
407 723 3163
Fax 407 984 8073

Index

I. Statement of the Case
II. Background
III. Relief Requested
IV. Response to Motion of TNC and Judd

Disputed Facts

V. Response to Motion of the County

A. County's Motion not valid.

B. Disputed Facts

C. Attorneys Fees

VI. Brief of Law

A. Standard for Summary Judgment

B. Regulatory Takings, Inverse Condemnation

C. Indispensable parties

D. Statute of Limitations

E. Immunity

F. Eleventh Amendment

G. Chapter 768.28 Notice

H. Conspiracy

I. Procedural Due Process

J. Substantive Due Process

K. Jury Trial

I. Statement of The Case

This suit seeks redress for three wrongs:

1. The County should pay Just Compensation to Farm & Grove for its taking of some 242 lots located in the Valkaria and Ten Mile Ridge Refugia areas created by the County for county-wide conservation requirements for scrub jay "core" nesting areas.
2. All Defendants should pay damages for a variety of "dirty tricks" in conspiring to secure the land of Farm & Grove at far less than fair market value.
3. All Defendants should pay damages for ruining Plaintiff's entire real estate lot sales business in an attempt to force Plaintiff to agree to a below-market price for the 242 lots.

II. Background

ALL OF THIS IS DISPLAYED AT LENGTH IN THE SWORN COMPLAINT AND IN THE PROFFER OF EVIDENCE. BOTH THOSE PLEADINGS ARE FOOTNOTED TO THE EXACT REFERENCE.

In 1968, Mr. N. R. Field, through his corporations, Atlantic Ridge Corporation and Cape Kennedy Estates, Inc. created approximately 6,700, 1.5 to 2.0 acre lots on his land holdings in the Malabar/Valkaria/Grant area of south Brevard County. He named it Cape Kennedy Estates.

All regulations of Brevard County and the requirements of the State of Florida Land Sales Act and of the federal Interstate Land Sales Act (HUD) were met. Roadways to service each lot were dedicated of record to the Grant Drainage District for the benefit of the public. The sales program was successful and all 6,700 lots were sold by early 1972 for a total sell-out price of over $33,000,000.00. These individual sales resulted in small acreage tracts suitable only for single-family residential use. Since all sales were out of state, the area was fractured into small holdings of non-residents.

In 1979, Edward "Buzz" Tietig, the owner and broker of record of Farm & Grove Realty Company, negotiated with Mr. Field's heirs to acquire some 1,350 randomly scattered lots which had reverted to the seller upon purchasers' defaults. Mr. Tietig was a businessman and an attorney well-experienced in this land sales field and could appreciate the fact that not only were the governmental registrations of irreplaceable value; but, also, that the area had so developed that besides the regular land sales markets, a substantial local "move-up" market from Palm Bay existed. Under these laws and regulations Farm & Grove could sell tracts of land without any physical improvement or any contractual or legal requirement or promise other than good title.

Farm & Grove provided a full warranty deed plus title insurance so it exceeded all legal requirements.

To secure the parcels involved a financial commitment of over $800,000.00. In addition, over $120,000.00 in sales and administrative costs had to be met. Mr. Tietig had his company undertake these obligations with the expectation of a $13,500,000.00 or better sell-out.

After months of delays in obtaining the re-activation of the registrations and licenses, Farm & Grove started its sales on July 4, 1981. The opening was a resounding success and within 60 days the public records showed 66 sales totaling over $665,000.00.

At the start of sales there was no governmental impediment to obtaining individual building permits nor were there any private deed restrictions. The AU zoning law for the County changed in 1973 to require 2.5 acres per house, but all of these lots were exempted by the "grandfather clause" of that ordinance that excluded prior sales of smaller parcels. Therefore, the lots were not only useable but became even more valuable. In 1980, the County commenced requiring that roadways be large enough for emergency vehicles, but that caused no problem.

Over the years the area progressed steadily; partially in the Town of Malabar (as RR zoning) and the majority in the County (as AU). The average value of homes increased so that today the average value is well over $175,000.00. The number of houses in the general area increased from about 55 in 1970 to about 1,600 homes today.

The fortunes of Farm & Grove also increased. Its sales to October 1, 1994, the alleged date of taking, totaled 603 lots with a total sales value of over $7,600,000.00. This performance met or surpassed the original economic analysis and expectations.

The only issue which had affected the business in years

prior to 1994 was the stiffening of the road ordinances by the County in areas where the roadways were not county-dedicated to require both paved and unpaved roads be built to DOT standards.

Since Mr. Tietig's family, as the largest landowners within the Grant Drainage District, controlled its board, an ordinance to allow road building while meeting these new requirements was passed. The County Commission then prevailed upon the Legislature to abolish the Grant Drainage District. This was done in 1988; however, by the law enacted, the road dedications were transferred to the County. This transfer of the road dedications eliminated the prior discrimination between county dedicated and non-county dedicated roads and prospective homebuilders had the right to install paved roads under the County's MSBU ordinance.

During this same era the County had created its Comprehensive Development Plan. The Cape Kennedy Estates area created a very minor impact and was well below the problem level in each aspect of the Plan.

In 1992 the County became aware of the necessity to take action to comply with the federal Endangered Species Act as it pertained to the scrub jay.

It could have taken a minimal passive steps, as did Indian River County and certain other counties, by merely requiring all building permit applicants first comply with U.S. Fish & Wildlife regulations. Instead, the Commission created an ad hoc committee to devise a plan to acquire control of the whole process. This committee produced a moderate plan but the plan did not transfer ownership and control of the areas to the County. Therefore, the County rejected the proposed plan and created a new Scrub Jay Committee to produce a plan with full land ownership and control resting in the control of its

Commission.

The Scrub Jay Committee did produce such a plan. However, it recognized that development within the "Core" nesting areas was incompatible with the conservation goal. It recognized that the plan had taken away the Core-area landowner rights to develop and so the Final Plan provided for fair market value compensation for all owners of Core lots.

The County Commission liked the Final Plan but was faced with a dilemma:

1. If it adopted the plan, the County immediately become liable for millions of dollars in takings claims at fair market value; or
2. Abandon the plan and lose the power and control over the land; or
3. Do the plan with EELS money only, but face development and price rises as the area evolved.

The Commission found another course and that is the crux of this suit. It decided that by not adopting the plan– formally, but proceeding with it under the cloak of the EELS program not only could it avoid immediate funding; but it also adopted a "willing buyer/willing seller" fiction and attempted to avoid the constitutional requirement of full, just compensation required by a taking.

The Commissioners were still faced with the spectre of more development and higher prices. This was brought to their immediate attention by the application for a paved MSBU road by Nations Land Company which would open up an area of the Valkaria Core next to the Habitat Golf Course. They plugged that loop hole with a beautiful Catch-22 maneuver. The building code already prohibited the issuance of a building permit unless the lot was serviced by a county-approved and maintained road. The Commission now "changed its policy" by a formal

Resolution dated October 14, 1998 to take away the availability of the MSBU in areas "where no development existed". So, without streets, no home/without a home, no streets. This affected not only the Core areas, but all Cape Kennedy Estates area, including all of Farm & Grove's holdings.

That decision was fiercely opposed by Farm & Grove and Mr. Tietig, but was passed. Thereafter there was no path open to landowners in Cape Kennedy Estates legally permissible and economically feasible to use the lots. There was no other feasible use of the property.

This regulatory scheme enacted by the County shut down the ability of owners to use the lots, all avenues of relief had been exhausted and the lots of Farm & Grove, not only in the Core areas; but, also, all lots in the Cape Kennedy Estates subdivision were fatally affected and could not be legally or ethically sold. The appraisals obtained by the County after this event confirm that without the MSBU ordinance, development of roads to Plaintiff's lots in Cape Kennedy Estates is not feasible.

Not only did this action of the Commission stop development but it also took the pressure off the County to acquire the lots speedily. Instead, the County, as the sole customer left, could adopt a "take it or leave it" attitude and offer far less than market value, content that no other competition existed either to buy or to build. Farm & Grove found that only 3% of its 700±unsold lots (about 21 lots) could be made buildable and saleable to meet both legal and market requirements. Its total sales of non-road lots after October 1, 1994 to date in this artificially depressed and restricted market are only 23, or less than 6 per year.

Farm & Grove was forced to go into unpaved road development in a few areas where its lots could absorb 100% of the road cost, so as to be able to deliver a lot it could ethically

sell. The County then countered this move by amending its regulations and criteria so as to delay the issuance of road building permits. It also created and imposed new engineering criteria applied solely to these applications which made road construction unfeasible.

To further its plan the Commission needed a real estate acquisition expertise at below market rates and, therefore, sought an outside acquisition agent which would embrace this below market value scheme. In The Nature Conservancy they found a willing partner. TNC bragged of its ability to extract land from owners at less than fair market value. TNC had prior activities in other counties in Florida and used them as references to confirm to the Commission it was willing to engage in this below market program. Its training of its Brevard Manager, Kevin Judd, reflected this attitude. To paraphrase John Pescatello, the attorney/agent of TNC who personally trained Mr. Judd, "we'll take it all at 40¢ on the dollar".

To prove the value of their services exceeded its $167,000.00 per year fee, TNC conspired with, instructed and trained Mr. Judd and the County officers and employees working with Mr. Judd to create a series of steps to depress prices further:

1. They instructed the appraisers to disregard hundreds of open market sales for use as comparables; and, instead, use only mitigation sales to the County. In this boot-strap manner they used their own discounted purchases to prove the market.
2. They instructed their appraisers to use non-arms length sales to create a "bulk-sale-discount-factor" to justify the "40¢ on the dollar" offers.
3. They pressured individual sellers with threats of "one-time only" offers.

4. They pressured individual sellers by stating or implying that the acquisition funds were limited and would not be replenished.
5. They offered only $500.00 per acre for wetlands, then instructed their environmental surveyors not to use the Florida official wetlands definition. In this manner all piney woods and palmetto areas would be considered wetlands and paid for at the lower rate.
6. They instructed the appraisers to value the property on a per acre basis rather than the per lot sales history used in the market for the past 25 years. They then instructed their land surveyors to compute the lot acreage net of any paper road easements. This two-step scheme allowed them to shrink the per lot price 8% to 20%.
7. They used low-ball tactics to prolong negotiations with landholders who had business or personal pressures, including signing letters of interest at agreed prices, then dropped the price to 40¢ on the dollar after the owner had agreed to sell.
8. They deliberately stopped negotiations with landowners in financial trouble until the landowner would either sell at the lower figure or TNC would purchase through a negotiated purchase price with the foreclosing mortgagee.
9. They increased the hardship on Plaintiff by delaying its unpaved road permit applications for over two years while granting other applicants in the same area permits in as few as 37 days.
10. They arbitrarily changed the engineering standards on unpaved roads to make them both

economically unfeasible and unmarketable because of excessive elevations and configurations.

11. They created fictions of "special conditions" in the Cape Kennedy Estates area to justify enactment by ordinance of criteria much more severe than other areas of the county.
12. They cut down all of the large trees on lands previously purchased in the Core areas so as to destroy the desirability of the area.
13. They blocked and/or locked public access over dedicated rights of way to Core areas so that the Valkaria Core landowners could not access their own lands.
14. They created "controlled" burn programs which would surround and threaten all lots in the Core areas, thereby destroying all desirability for residential use.

As the result of these actions Farm & Grove sales have vanished, its mortgage and tax debt increased and its previously met economic expectations were shattered.

III. Relief Requested

Plaintiff seeks:

1. Constitutional just compensation for the 242 lots taken. This includes fair market value for the lots, interest from date of taking, court costs and attorney's fees.
2. Damage to Plaintiff's business of lot sales by making the lots impossible to develop and, accordingly, illegal and/or infeasible to sell to the public.
3. Damages for the conspiracy denying Plaintiff its US and Florida constitutional rights.
4. Injunctive relief so that Plaintiff does not face

arbitrary and capricious rules or bear an unconstitutionally unfair burdens of cost in the installation of roads.

Plaintiff has requested a trial by jury of all matters properly triable by jury.

IV. Response to Motion of TNC and Judd

We will attempt to respond in the same order as the allegations appear in the Motions (Paraphrased). However, we first request you read the cases collected in the separate appendix. They show the law applied to very similar facts.

Farm & Grove is a real estate investor/speculator.(M-1). Does Publix speculate in cans of tomato soup and Jim Rathmann speculate in Chevrolets? Farm & Grove is a duly licensed business and has done business in Brevard County for 18 years. It has, of public record, more than 600 sales of Cape Kennedy Estates lots prior to the actions of the Defendants. Price and terms also are of public record.

Farm & Grove has always been subject to the Endangered Species Act.(M-2) So what? Everyone in America is subject to the Act. It is the acts of the Defendants that defined Plaintiff's lands as part of the area chosen by Defendants to be Defendants' undevelopable Core conservation area and the illegal methods attempted by Defendants to gain control of these lands without just compensation that started this suit.

Brevard County never enacted, formally, informally or otherwise . . . the Scrub Jay Program. (M-3) That is the whole crux of this suit — the de facto program of the County assisted by TNC and Judd — the regulatory scheme to freeze sales and reduce prices — the unethical and illegal methods used by TNC and Judd to gull the landowners. All of this is detailed in the exhibits to the Complaint, in the Depositions filed and, especially, in the Offer of Proof in support of the Punitive Damages amendment. This is a

factual argument that destroys any Summary Judgment Motion.

The EELS plan is a will buyer/willing seller program and in no way prohibits or regulates the development of property. (M-3) That is a factual argument. It is wrong. The Act gives the State of Florida the power of eminent domain (Proffer-2). That power has been used 50 times for 2,088 acres. That is not a willing seller program.

The effect of the EELS program or any other aspect of the Defendants' actions upon the real estate market for these lots is an issue of fact. See Affidavits of Judy Fox, as to the drop in sales. See Affidavits of Jason Steele and Robert Leichtenberg as to the detractive effect of all these regulations and programs upon the public market for these lots.

See the minutes of the EELS Committee, itself, as to the requirement of dealing at "fair market value".

TNC came into the picture well after the land was described as environmentally sensitive. Neither TNC or Judd played any policy-making role in identifying the land targeted for acquisition. (M-3) Again, so what. If a bank robber had no part in selecting the bank to be robbed he is still guilty of participating in the crime. However, that is not a true factual allegation. The depositions of Barr, Townsend and Pfeffer shows that an agent of TNC, was in the County during the policy formation and actively participated therein.

TNC and Judd did not hire or contract with the appraiser. (M-3) Those are words on a legal tight-rope. They are literally true as the County "hired and contracted with" all of the appraisers, surveyors, conservationists and the like. But, who told the County that appraisals were needed? The degree of influence, directly and indirectly, upon the appraisers selected and the work product is a factual jury question. For example, Judd admits he corrected the wetlands definition problem when brought to his attention. TNC

was required, by contract, to be sure that all procedures met Florida standards by the terms of its contract with the County. See also Affidavit of Robert Leichtenberg. The degree of influence is a factual matter.

Contrary to allegations no agreement to rig wetlands determination. (M-3) Again, a factual issue. TNC and Judd were required by the contract with the County to be sure that laws were observed, especially those in the contract between the County and Florida DEP. That these laws weren't observed is admitted. That Judd was active in securing the original survey and then later had the delineation revised is admitted. We are arguing "he said — she said". That is a factual dispute. It is improper for this Motion.

Nations Land Company has made mitigation sales at $5,000 per acre. (M-4) This only proves Plaintiff's contention that these Core areas are known by all to be approved conservation lands and desired by the County for that use. The very acts complained of have funneled control of the quantity of purchase and the price into the Defendant's hands. Defendants' cannot create a situation and then say the resulting conditions reflect an "open market". The fact that these few sales were made only proves a program is going forth to acquire all Core lands. What TNC did not tell the Court is that these lands wind up in the control of the same County and DEP. Again, a factual distortion.

The EELS program doesn't, per se, prohibit development provided landowners comply with Federal and State requirements. (M-4) Another carefully crafted statement. It carefully does not include County Requirements. But, even if it doesn't, per se, prohibit development, so what? It was the combination of requirements and regulations, and, especially, the building and road ordinances of the County which pushed past ordinary police powers and, instead, ruined use and saleability of the property and effected a taking.

The lands of Plaintiff are non-contiguous, vacant and unimproved and located in a largely undeveloped area.(M-4) So what? There was a market. Sales were good. Then the acts of Defendants destroyed the market and sales.

Plaintiff has been restricted at all times from advertising the property as building lots. (M-5) So what? The parcels had been previously registered an unimproved tracts and this requirement was continued as to advertising copy. It did not prohibit the lots from being used as home sites. The building of over 1,500 homes in the area is good proof of usability. It is also proof of desirability.

They are not accessible by road and are subject to surface water. (M-5) This is a quote from the Offering Statement. It was there for the original sales program in 1968. All lots have dedicated rights of way for road, utility and drainage purposes. It is admitted the roads are not physically installed. This is the self-imposed condition the County seized upon to halt all developed and, thereby, kill all sales.

As to the surface water, that is a quote from the Offering Statement in effect since 1968 and which statement is preceded by "10% of the land is". That is a deliberate misquote.

The lots are subject to US F & W permitting requirements. (M-5) That is admitted. That is not a pertinent fact. It is not what stopped road development. It has not stopped construction where roads are installed. It is the County's designation of a non-mitigated Core area and its stopping road development that have affected the destruction of the private market.

County Ordinances haven't really changed. (M-5) The effect of the ordinances upon sales, the requirements of disclosure and fraud are all questions of fact. There has been an effect. See Affidavits of Steele, Leichtenberg and Fox. This is a fact-driven question.

MSBU funding for roads was once available in the Cape

Kennedy Estate area, but no longer except as per Ordinance 91-08. (M-6) That is a crucial admission by Defendants. It admits that it was once available. It admits it is no longer available. Now the remaining facts show this helped kill Plaintiff's business.

Since the suit was filed, Plaintiff has sold lots for mitigation purposes. (M-6) So what? The County accuses Farm & Grove of failure to mitigate. The fact that sales were made to keep the company going does not affect the validity of the claims. It only points up the economic pressure on Plaintiff which forced it to sell below market.

Plaintiff never applied for a paved MSBU. (M-6) So what? Plaintiff's business was selling lots from 1981 until 1994 when that business frustrated by the actions of Defendants.

Plaintiff has applied for and been granted an unpaved MSBU. (M-6) Not true, see Affidavit of Judy Fox. Another fact dispute.

Since this case started Plaintiff has applied for a number of unpaved road permits which have not been finally enacted upon by the County. True, Farm & Grove has taken all feasible business avenues which will allow it to survive. The fact that TNC admits the permits have not been issued after more than 2 years in processing only proves Plaintiff's case. The balance of TNC's Motion is legal argument. It is answered in our Memorandum Brief.

V. A. Response to Defendant, Brevard County's Amended Motion for Summary Judgment

The 16 paragraphs of County's Motion are unsupported by any factual particularity or by the citation of any legal authority. Rule 1.510 "requires a movant for summary judgment to state with particularity in its motion the grounds upon which the motion is based and the substantial matters of law to be argued. The obvious purpose of this rule is to eliminate surprise and to provide the parties a full and fair opportunity to argue the issues." Lee v.

Treasure Island Marina, Inc., 620 So. 2d 1295, 1297 (Fla 1st DCA 1993). Obviously, this was done so as to "sandbag" the Plaintiff at time of hearing. The County has moved for Summary Judgment, while at the same time it has actively denied the discovery attempts.

It states "the actions don't constitute policy" -- a purely factual statement. While at the same time it was successful in its Motion for Protective Order to deny Plaintiff the right to depose each of the Commissioners.

It has further delayed, misanswered and non-answered a substantial number of Interrogatories. See Motion to Compel Discovery, copy attached.

A party may not benefit by its own misdeeds. Its Motions should be deemed or at least delayed until this discovery is complete. See Kingswood south, Inc. v J I. Case Credit Corp, 623 So 2d 584 (FLA 4th DCA, 1993), copy attached.

Nonetheless we answer in our Memorandum using the corresponding paragraph numbering of the Motion. We also comment to certain paragraphs as follows:

Paragraph 4. The County argues that Plaintiff's investment-backed expectations did not include 1.5 acre residential lots. It then goes on to detail the factual basis for this assertion.

That is surely a factual dispute. It is well controverted by over 600 sales. It is well controverted by the Proffer of evidence and by the Affidavits of Steele, Leichtenberg and Fox filed in contravention of this Motion. Common sense shows the assertion in Paragraph 4 are not only argumentative but also false.

Paragraph 10. The denial that the actions do not constitute policy is pure argument. It completely begs the question of what the policy was. It has been well pled and confirmed by Mr. Pfeffer in his deposition. It was stated by Commissioner O'Brien and contained in this Proffer. The County has not denied that in any manner the "policy change" which took away the use of the MSBU

was initiated and passed by the County Commission (See Complaint Exhibit E). That is certainly the policy of the County.

Paragraph 11. This ground was raised previously by Motion to Dismiss and denied by Judge Richardson. See Paragraphs II G and H in Order of October 20, 1997, copy attached.

Paragraph 12. This ground was raised previously by Motion to Dismiss and denied by Judge Richardson. See Paragraph 1 D in Order of October 20, 1997. Also see Memorandum.

Paragraph 14. This is pure argument. A de facto adoption is alleged. It is supported by the State Contract, the TNC contract, the CARLS applications, the acquisition program that has purchased dozens of parcels and hundreds of acres. It is admitted by Mr. Pfeffer in his deposition.

Paragraph 15. This, again, is pure argument. The County can't blame another for a program the Commission voluntarily adopted. The Commission could have elected to do nothing but have permit applicants first secure a USF& W permit.

A constitutional right cannot be taken away by any statute or regulation.

V. B. Response to Motion of the County for Attorneys Fees

Attorney fees for Defendant County would be inappropriate because a solid basis exists to form a colorable claim under all counts in Plaintiff's Complaint. The County is not entitled to attorney fees because of the high standards that militate against granting attorney fees to prevailing defendants under 42 U.S.C. § 1988. The standard is so stringent that the plaintiff's action must be "meritless in the sense that it is groundless or without foundation" in order for an award of fees to be justified. Busby v. City of Orlando, 931 F.2d 764, 787 (11th Cir. 1991). As the Supreme Court held in the context of denying S 1988 fees to prevailing defendant in a S 1983 action:

> The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. As we stated in Christiansburg: 'To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'

Hughes v. Rowe, 449 U.S. 5, 14-15 (1980) (citing Christiansburg Garment Co. v. E.E.O.C., 434 U.S., 412, 422 (1978)).Here, Here, Plaintiff's claims are well grounded and made in objective (and subjective) good faith. The claims have been tested and tempered under the fire of prior motions to dismiss. See Jeffries v. City of Chicago, 540 F. Supp. 1371 (N.D. Ill. 1982) (holding that defendants' participation in the activity forming basis of lawsuit provided plaintiff with a sufficient rational basis for naming them in the complaint and pursuing discovery to determine whether they participated in the violation of plaintiff's rights, thereby precluding the award of costs and attorney fees to defendants prevailing on motion for summary judgment). Here, Plaintiff has more than a rational basis for his claims against Defendants. Here, Plaintiff has at least some factual basis to support each and every one of its allegations, and to counter each of Defendants' defenses. Therefore, for this and all the foregoing reasons, attorney fees should not be awarded to Defendant County.

VI A. Brief of Law

Standard for Summary Judgment

The standard for adjudication on a motion for summary judgment requires that Defendant's motion in this case be denied. The Rule states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 1.510(C), Fla. R. Civ. P. "The strict procedural requirements for summary judgment motions contained in Florida Rule of Civil Procedure 1.510 are designed to protect a litigant's constitutional right to a trial on the merits of a particular claim." Bush v. State Farm Fire & Cas. Co., 711 So. 2d 68, 69 (Fla. 2d DCA 1998). The granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So. 2d 129, 132 (Fla. 4th DCA 1969). "The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities." Bifulco v. State Farm Mutual Automobile Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997).

Rule 1.510 "requires a movant for summary judgment to state with particularity in its motion the grounds upon which the

motion is based and the substantial matters of law to be argued. The obvious purpose of this rule is to eliminate surprise and to provide the parties a full and fair opportunity to argue the issues." Lee v. Treasure Island Marina, Inc., 620 So. 2d 1295, 1297 (Fla 1st DCA 1993). "The purpose of a summary judgment proceeding is to determine the existence or absence of material issues of fact and is not designed as a trial by affidavit or deposition." McCauley v. Eastern Steamship Lines, Inc., 211 So. 2d 72, 74 (Fla. 4th DCA 1968) (footnote omitted). "It is well settled that summary judgment may not be the vehicle for disposition of conflicting issues based upon colliding material claims and counterclaims that are supported on the one hand and opposed on the other day by depositions and affidavits." Martin v. Clyde Knowles General Contractors, Inc., 327 So. 2d 865, 866 (Fla. 1st DCA 1976). A summary judgment proceeding "is not designed to conduct a trial of the issues drawn. All evidence must be viewed in the light most favorable to the party against whom the motion is made, and if there is a genuine issue of material fact, then the motion should be denied." Weinstein v. General Accident Fire and Life Assurance Co. Ltd., 141 So. 2d 318, 321 (Fla. 1st DCA 1962) (footnote omitted). "It was never intended by this rule that cases should be tried by affidavit or that affidavits, interrogatories or depositions or similar evidence, could be used as substitutes for a jury trial. To sum it all up, if there are issues of fact and the slightest doubt remains, a summary judgment cannot be granted." Gordon v. Hotel Seville, Inc., 105 So. 2d 175, 178 (Fla. 3d DCA 1958), cert. denied, 109 So. 2d 767.

"When acting upon a motion for summary judgment, if the record raises the slightest doubt that material issues could be present, that doubt must be resolved against the movant and the motion for summary judgment must be denied." Jones v. Directors Guild of America, Inc., 584 So. 2d 1057, 1059 (Fla. 1st DCA

1991).

A trial court is precluded from granting summary judgment if the evidence is conflicting or if "inferences reasonably deducible from the evidence cast doubt" on a material issue. Lane v. Talloni, 626 So. 2d 316, 317 (Fla. 5th DCA 1993). "Even if there is no conflict in the evidence, a motion for summary judgment should be denied where inferences reasonably deducible from the evidence cast doubt on the issue." 4444 Corporation v. City of Orlando, 598 So. 2d 287, 288 (Fla. 5th DCA 1992). "A court which draws its own inference from among the lawful inferences, and enters a summary judgment based thereon, deprives the parties of their right to a trial by a jury contrary to the purpose and intent of the rule governing summary judgments." Register v. Redding, 126 So. 2d 289, 291 (Fla. 1st DCA 1961). The burden, furthermore, is on the movant to demonstrate conclusively that the nonmoving party cannot prevail. Gomes v. Stevens, 548 So. 2d 1163 (Fla. 2d DCA 1989). "If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment should not be granted." Wilson v. Woodward, 602 So. 2d 547, 549 (Fla. 2nd DCA 1992).

Here, as argued in detail in the foregoing sections, Defendant cannot meet this burden and show that no material facts remain undisputed and that the issues can be resolved purely as a matter of law. Therefore, Defendants' Motions For Summary Judgment must be denied.

VI B. Brief of Law

Regulatory Takings, Inverse Condemnation

The best starting place for the law of regulatory taking or inverse condemnation starts with Pennsylvania Coal Company v Mahon, 260 US 393 (1922). There Justice Holmes stated: "The general rule at least is that while property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a taking."

Armstrong v US, 364 US 4 (1960) held that the Fifth Amendment was: ". . . designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole."

In Penn Central Transportation Co v City of New York, 438 US 104 (1978), a 3-pronged test of a taking was established:

(1) the economic impact of the regulation on the claimant;

(2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and

(3) the character of the government action.

Lucas v So Carolina Coastal Council, 505 US 2003 (1992), held that the Taking Clause of the Fifth Amendment could be violated by direct government appropriation of property without just compensation or by government regulation which interferes with the owners use of the property to the extent that it accomplishes nearly the same result.

It also held that a partial taking is compensable.

Dolan v City of Tigard, 512 US 374 (1994) then required a two-step test for the validity of a regulation that:

(a) there must be an "essential nexus" between the legitimate state interest and the permit condition, and

(b) there must then be a "rough proportionality" between the condition enacted and the impact of the proposed development.

In 1997, Suitum v Tahoe Regional Planning Agency, 520 US 725 (1997), all questions of ripeness were resolved in favor of the landowner without necessity for futile acts.

In 1998, Eastern Enterprises v Apfel, 524 US 498

(1998), confirmed this line of cases and found a constitutional taking when a severe, disproportionate and extremely retroactive burden had been imposed.

We also have facts such as denial of access, "controlled" burns, clear cut lumbering and all-pervasive publicity which have rendered the lots unfit for any use.

As said by the Supreme Court, Loretto v Telepromptions Manhattan CATV Corp, 458 US 419 (1980) states:

> ". . . we have long considered a physical intrusion by government to be a property restriction of an usually serious nature for purposes of the Takings Claus. Our cases further establish that when the physical intrusion reaches the extreme form of permanent physical occupation, a taking as occurred."

Quoting United States v Causby, 328 US 256 (1946) that frequent flights immediately above a landowner's property constituted a taking:

> "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

VI C. Brief of Law

Indispensable Parties

Despite Brevard County's unsupported affirmative defense, the United States Fish & Wildlife Service and the Department of Natural Resources of the State of Florida are not indispensable parties to this action. The Defendant has the burden of proving its affirmative defenses. Captains Table, Inc. v. Khouri, 208 So. 2d 677 (Fla. 4th DCA 1968); Hough v. Menses, 95 So. 2d 410 (Fla. 1957).. An indispensable party is defined as "a person with such an interest in the subject matter of

the action that a final adjudication cannot be made without affecting his interests or without leaving the controversy in such a situation that its final resolution may be inequitable." City of Riviera Beach v. Bjorklund, 563 So. 2d 1114, 1115 (Fla. 4th DCA 1990). Here, Defendant Brevard County does not prove that a judgment against Defendant Brevard County and/or the other defendants would not be inequitable, as such a result would in no way adversely affect the State of Florida or the United States. There is no evidence that the interests of the State of Florida or the United States would be harmed if Plaintiff prevails and just compensation is paid. See Spierer v. City of North Miami Beach, 560 So. 2d 1198, 1200 (Fla. 3rd DCA 1990) (holding that while agency has extensive regulatory authority over defendant, the record does not reflect whether the agency has taken regulatory action with respect to plaintiff's immediate interests, nor does it reflect whether the agency's substantial interests would be affected in such a way as to render the agency an indispensable party); W.R. Cooper, Inc., v. City of Miami Beach, 512 So. 2d 324, 326 (Fla. 3rd DCA 1987) (holding that the determination of damages and a judgment for their recovery would have constituted the full relief sought by plaintiff and would have affected the rights of no other parties, even if Secretary of Labor, the other party, is subject to suit in subsequent related actions). Here, insofar as their programs are related to the State of Florida or the United States governments, Defendants have an opportunity to craft and implement their programs in a lawful, fair, and just manner. No evidence exists that when the relevant state and federal programs are implemented precisely as intended by the state and/or federal governments, that the programs would result in an unconstitutional taking of plaintiffs' property. See Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737

(5th Cir. 1988). In other words, Defendants could and should have paid Plaintiff just compensation for the lands taken, which is the requirement under both Florida and federal law. Even if Defendants' actions were taken in a spirit other than the malice alleged, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Holmes, C.J.). Furthermore, there is no evidence that either the State of Florida or the United States government conspired or colluded in denying Plaintiff its just compensation or other rights. The U.S. Fish & Wildlife agency clearly is not a necessary party to resolve this issue. Therefore, Plaintiff did not fail to join indispensable parties and the motion should be denied.

VI D. Brief of Law

Statute of Limitations

Plaintiffs claim of inverse condemnation is not barred by the statute of limitations -- an affirmative defense raised by Defendant Brevard County. As a threshold matter, the Defendant has the burden of proving its affirmative defenses. Captains Table, Inc. v. Khouri, 208 So. 2d 677 (Fla. 4th DCA 1968); Hough v. Menses, 95 So. 2d 410 (Fla. 1957). Defendant County cannot carry its burden of proof because an action for inverse condemnation "must be controlled by the four-year provision applicable to '[a]ny action not specifically provided for in these statutes.'" Sarasota Welfare Home, Inc. v. City of Sarasota, 666 So. 2d 171, 172 (Fla. 2nd DCA 1995) (quoting s 95.11(3)(p), Fla. Stat.. Furthermore, the general rule regarding when this four-year period begins to run is "from the time the cause of action accrues" and that "a cause of action accrues when the last element constituting the cause of action occurs." Id. 666 So. 2d at 172-73.

Here, the cause of action accrued, at the earliest, when the Scrub Jay Plan was de facto adopted on or about April 26, 1993; or, as Plaintiff contends when Plaintiff found that from and after October 1, 1994, when the availability of the MSBU for road construction was taken away, its market was destroyed as it could not sell any of The Lots without making full disclosure to potential purchasers of the various laws and duties constraining Plaintiff and potential buyers of Plaintiff's lots. Para. 13-14, Verified Second Amended Complaint. The taking was not complete until all possibilities of economic value were eliminated by the actions of Defendants. The present action for inverse condemnation was filed on September 4, 1996 -- less than 30 months after the final element of the taking occurred and well within the four years allowed by the statute of limitations. Defendants do not and cannot prove otherwise. Therefore, this action for inverse condemnation is not barred by the statute of limitations.

VI E. Brief of Law

Immunity

Monell v Department of Social Services, 436 US 658 (1978) found local governments were "persons" subject to §1983 liability.

Tower v Glover, 467 US 914 (1984) found liability for conspiracy conducted under color of state law and refused immunity for state prosecutors.

Howlett v Rose, 496 US 356 (1990) held that state immunity was not available in a §1983 action.

Hafer v Melo, 502 US 21 (1991) held that state officers may be personally liable for damages for actions taken in their official capacities.

Private parties also are not protected. In Lugar v Edmondson Oil Company, 457 US 922 (1982), it extended

liability to a corporate creditor and its president who acted under color of state law.

In June of 1997, the Supreme Court in Richardson v McKnight, 521 US 398 (1997) found that prison guards who are employees of a private prison management firm were not entitled to immunity.

The contract between DEP and the County required the County to be the acquiring agent. It hired TNC for that job. The contract specifies TNC is an independent contractor. TNC hired Judd to carry out TNC's duties. Richardson v McKnight, supra, controls.

All are liable under state law and under §1983.

VI F. Brief of Law

Eleventh Amendment

Defendant Brevard County clearly does not enjoy Eleventh Amendment immunity, neither in this case or elsewhere. "Eleventh Amendment immunity does not extend to independent political entities, such as counties." Tuveson v. Florida Governor's Council on Indian Affairs, 734 F.2d 730, 732 (11th Cir. 1984); Smith v. Avino, 866 F. Supp. 1399, 1403 (S.D. Fla. 1994); Thornquest v. King, 626 F. Supp. 486, 488 (M.D. Fla. 1985). The United States Supreme Court recently explained some of the rationale underlying the withholding of Eleventh Amendment immunity to counties is in Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 47 (1994):

> Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity. * * * Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's

> treasury. Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations. [Quotations and citations omitted.]

Here, the state treasury is in no way at risk for liability for an award against Brevard County to Plaintiff. Therefore, Brevard County cannot receive immunity under the Eleventh Amendment.

Furthermore, Brevard County is not an agent of the State of Florida for Eleventh Amendment purposes. All counties in Florida are afforded a great measure of independence and sovereignty in their actions with the state, including the independence of whether or not to enter into a voluntary contract for cost-sharing under the EELS program. (See County-State EELS contract.) The State of Florida's incentive program is not to be confused with coercion or unconstitutional conditions. See Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 736 (5th Cir. 1988). At any rate, as noted in Hēss, control is not dispositive regarding Eleventh Amendment immunity. Id.

Moreover, the Eleventh Amendment concerns the federal judicial power used against the states. The case at bar concerns a State of Florida court adjudication of a dispute with a Florida county, and no United States court is directly involved. However, in state court, local entities remain subject to suit from federal claims to the same extent as they would be in federal court. In other words, when parties raise federal claims (at least, under Section 1983), then federal law must determine whether particular governmental entities are subject to suit." Hufford v. Rogers, 912 F.2d 1338, N. 1 (11th Cir. 1990) (citing Howlett v. Rose, 496 U.S. 356 (1990)). In Howlett, the Court found that local governmental entities, such as counties, were "persons"

under S 1983, were not immune under either the Eleventh Amendment or Florida sovereign immunity, and were subject to suit in Florida and federal courts for violations of S 1983. Id. In Howlett, the Florida District Court of Appeals' refusal to entertain s 1983 actions against state entities such as counties violates the Supremacy Clause. Id. Thus, despite the Eleventh Amendment, Brevard County is subject to the S 1983 counts in this Court.

Finally, the failure of the State of Florida to defend Brevard County is evidence that the Eleventh Amendment does not immunize Brevard County in this lawsuit. A factor that courts have sometimes found persuasive in determining whether the defendant is a state actor or agency, is who is representing the entity in the lawsuit. See Houck & Sons, Inc. v. Transylvania County, 852 F. Supp. 442, 450 (W.D. N.C. 1993). Here, Scott Knox, the Brevard County County Attorney, is representing Brevard County, and TNC has private Counsel. Thus, the County is not afforded Eleventh Amendment immunity and the motion should be denied.

VI G. Brief of Law

No Chapter 768.28 Notice Necessary

This is an action for a taking. Chapter 768.28 covers only matter ". . . to recover damages in tort. . . ". Nor are damages from an exercise of a government police power a tort. Neither can a state condition access to §1983 damages upon such notice. Howlett v Rose, supra.

This statute does not apply to private parties such as TNC and Judd. See Witmer v University of Florida Police Department, 610 So 2d 87 (Fla 1st DCA, 1992).

Here Plaintiff claims intentional acts of conspiracy as a part of the taking. Thus, it keys the same character as the taking and so is not within the statute. Moreover, the County, as a

"person" under §1983 has no protection per Howlett, supra.

VI H. Brief of Law

Conspiracy

The allegations of the Complaint are clear. The County wished to control Plaintiff's land without necessity to pay just compensation. It also wanted to stop all development and price increases while it "squeezed" its victims, the Core property owners.

Its policy was to pay as little as possible (Pfeffer depo), its tactics wee "to be meaner than a junk yard dog" (O'Brien statement). It changed its ordinances to shut down all use and all market while it awaited bargain purchases.

These facts were known by TNC and by Judd before they joined up (application of TNC, Deposition of Judd). The instruction to Judd was specific: 40¢ on the dollar. Judd went even further with his own method of pricing: the lowest comparable of the lowest appraisal.

TNC cited its ability to buy cheaply in each quarterly report. It cited "81% of market value" in its public hearing on contract renewal.

TNC was in charge of all acquisition activities. It was the actual wrong doer to carry out the conspiracy.

The Plaintiffs are not required to prove that each participant in the conspiracy knew "the exact limits of the illegal plan or the identity of all the participants." Hoffman-LaRoche, Inc. v Greenberg, 447 F2d 872, 875 (7th Cir. 1971). The Plaintiff must, however, prove that there is a single plan, "the essential nature and general scope of which is known to each person who is to be held responsible for its consequences". Richardson v City of Indianapolis, 658 F 2d 494 (7th Cir, 1981). A conspiracy may be proven by circumstantial evidence and should not be taken from the jury as long as there is a possibility

that a jury can reasonably infer from the circumstances that the required elements of conspiracy have been met. Hampton v Hanrahan, 600 F2d 600, 621 (7th Cir. 1979).

Chicago Miracle Temple Church, Inc. v Fox, 901 F Supp 1333, 1347-48 (ND Ill, 1995).

The Proffer of Evidence previously filed in this cause goes into this matter in such detail as would take pages here. Likewise, the depositions and the exhibits to the Complaint.

There are substantial facts of record.

VI I. Brief of Law Procedural Due Process

Defendants content Suitum and Williamson hold that a procedural due process claim cannot be brought until it has exhausted those procedures.

Actually, the quotation of Williamson in Suitum, (page 1665) is: ". . . the property owner cannot claim violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." (Emphasis supplied).

Suitum held that the claims were ripe. It further held (page 1670): "Suitum seeks not to be free from the regulations but to be paid for their consequences".

That is what we seek, plus the damages resulting from the failure of the Defendants to follow constitutionally imposed guarantees when those procedures are used.

VI J. Brief of Law Substantive Due Process

Plaintiff, as a matter of law, can maintain both a takings claim and a substantive due process claim in this lawsuit.

In the first place, Defendant misquote the holding of Villas of Lake Jackson, Ltd. v Leon County, 121 F 3d 610 (11th Cir. 1997). It allowed the combining of a substantive due process claim with a Takings Clause claim for arbitrary and capricious conduct. We certainly have that in the removal of the MSBU "by policy" from its uniform application. We also have

arbitrary and capricious conduce resulting in business damages as well as in the denial of just compensation and in the myriad "dirty tricks".

All of that is now irrelevant since Eastern Enterprises v Apfel, supra. That case was both for substantive due process and a taking. The majority of the judges split as to which remedy was the most appropriate and never questioned their joinder.

VI K. Brief of Law Jury Trial

Under Florida law of condemnation, the Judge decides if a taking has occurred. The landowner is then entitled to a jury of 12 to determine damages.

§1983 damages are provided by federal statute and federal law prevails, Howlett v Rose, supra. Federal law requires a jury trial both as to the question of whether a taking has occurred and also as to damages, DelMonte Dunes at Monterey Ltd v City of Monterey, 95 F3d 1422 (CA 9th, 1996)(cert pending).

The conspiracy cause is unquestionably a common law action with a right to a jury trial.

This does create a conflict as to one area only, the question of whether a constitutional taking has occurred.

Since a jury must be empaneled for the remaining questions, we believe the best procedure is to allow the entire case to be decided by the jury. If the Judge agrees with the jury verdict as to the taking, he can treat it as an advisory opinion and enter his concurring finding.

It is only in the event there is a split between the §1983 count and the taking count that the Judge could be in a dilemma. That can be discussed and provided for prior to trial.

/s/_____

Edward C. Tietig, P.A.

Attorney for the Plaintiff

Excerpt of Respondents TNC and Judd's Motion for Summary Judgment in Case No. 96-14296-CA

28. Actions brought under Title 42, Section 1983 for alleged violations of a plaintiff's property rights may be rendered as either procedural or substantive due process claims. Suitum V. Tahoe Regional Planning Agency, 117 S. Ct. 1659 (1997); Williamson County Regional Planning Commission V. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985). Procedural due process claims attack the sufficiency of the procedures established by the State to protect the plaintiff's constitutional right to its property. Before a court may determine if the procedures provided by the State are sufficient, the plaintiff must first avail itself fully of those procedures, which includes litigating its claim for inverse condemnation to a conclusion. Id. Since the Plaintiff failed to litigate its claim for inverse condemnation to a conclusion, its procedural due process rights claim is not ripe for review. Id. Therefore, any claim by Plaintiff grounded in a violation of its right to procedural due process must be denied and judgment entered for the Defendants.

Excerpt of Respondents TNC and Judd's Memorandum of Law supporting their Motion for Summary Judgment

27. Plaintiff's apparent allegation of violation of procedural due process under 42 U.S.C. Section 1983 are not ripe for review by this Court.

28. It is well established that before Plaintiff may bring a claim for procedural due process, it must first exhaust its remedies for inverse condemnation. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S. Ct. 301(1985).

29. The purpose of this requirement is self evident. A landowner may not be heard to complain that the procedures afforded it are insufficient to protect its right to just

compensation until it actually utilizes those procedures and an outcome is determined.

30. The United States Supreme Court has held that in order to fully utilize the procedures provided by the State, the landowner is required to litigate to a conclusion its inverse condemnation claim under state law.

31. In Williamson, supra., the U.S. Supreme Court held that:

> [T]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Filth Amendment require that just compensation be paid in advance of, or Contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation"' exist at the time of the taking. If me government has provided an adequate process for obtaining compensation and if resort to that process, "yield [s] just compensation, then the property owner "has no claim against the Government" A)r a caking. thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. Section 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation" (citations omitted).

Williamson. 105 5. Ct. at 3120-3121.

32. There is no longer any dispute under Florida law that a cause of action for inverse condemnation through the application of a land use restriction exists. See Tampa-Hillsborough County Expressway Authority v.

A.G.W.S. Corp., 640 So. 2d 34 (Fla. 1994); Department of Transportation v. Weisenfeld, 617 So. 2d 1071 (Fla 5th DCA 1993); Gardens Country Club v. Palm Reach County, 712 50. 2d 398 (Fla. 4th DCA 1998); I.T. Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990).

33. Since Florida recognizes the tight to bring a cause of action for inverse condemnation, any claim that the Plaintiff has been denied just compensation under Amendment 5 of the United States Constitution is not ripe for review, and judgment should be entered in favor of Defendants. Sec also Villas of Lake Jackson Limited V. Leon County, 121 F. 3d 610 (11th Cir. 1997, holding that if a challenge to a regulatory taking claim states a claim at all, it is a cause of action under the "taking clause," and subject to the ripeness prerequisite of exhaustion of inverse condemnation cause of action.

Excerpt from Respondent Brevard County's Motion for Summary Judgment

9. The Plaintiff has not ripened its claim for inverse condemnation or for a civil rights violation under 42 USCA § 1983.

Excerpts from Petitioner's Initial Brief to the Fifth DCA in Appeal Number 99-2355

b. Issues of material fact exist with respect to whether Appellees destroyed F&G's economically viable use of its property. (P.34)

There is much evidence in the record to show that F&G was denied economically viable use of its property. For example: F&G averaged sales of 60 lots per year before the alleged taking occurred. After the taking occurred, F&G could not sell any Core lots (except a very

few as mitigation sales), and could sell very few of its non-Core lots in Cape Kennedy Estates. Thus, F&G's business was destroyed as a result of the actions of the Appellees, and F&G is entitled to compensation for the damages it suffered as a result of the destruction of its business. The Appellees argue that F&G's economically viable use of the property was not denied because there is a new market for mitigation land -- that is land that developers can purchase and not develop in order to mitigate their development in other areas. However, there is a factual question as to whether this market actually exists. Furthermore, the mitigation market is artificially created by the same regulatory body (the County) that is seeking to conserve that property. In other words even if this artificial market actually exists, the County created the market through its regulations. Joint Ventures, Inc. instructs that the County should not be allowed to use its regulatory powers to decrease the market value of the property so that the County can purchase the property for a lower amount. 563 So. 2d at 626. Similarly, allowing proof of the existence of a mitigation market (assuming *arguendo* that one exists) created by the County as proof that F&G has not lost all economically viable use of its property, is just another way for the County to use its police powers to obtain the property at less than fair market value.

Thus, F&G has shown that issues of material fact exist as to whether or not F&G was denied economically viable use of its property, and the trial court's decision granting summary judgment should be reversed.

* * *

D. F&G maintains a conspiracy under § 1983. (p. 43)

F&G adduces sufficient evidence to maintain its S 1983 conspiracy claim against all Defendants. To establish a prima facie case of conspiracy to violate rights protected by s 1983, a plaintiff must demonstrate that the defendants reached an understanding' to violate his rights. G.J.R. Investments, Inc., v. County of Escambia, Florida, 132 F.3d 1359, 1370 (11th Cir. 1998) (citing Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988)). Here, those rights are any of F&G's federal claims of Fifth Amendment Taking, Substantive Due Process, or Equal Protection. Furthermore, evidence is adduced that Defendants reached an understanding' to violate those rights. As argued previously, the contract between Brevard County and TNC is an express written agreement of the understanding to implement the de facto restrictions of the Scrub Jay Plan; to use controlled burns, publicity, and other means to devalue the land and implement the Plan; to use illegal methods to assess the value of affected lands; and, to pay F&G and other similarly situated landowners less than fair market value for the lands that are thereby acquired; i.e., taken. Also, TNC was aware of the below market value policy of the County (Pfeffer Deposition, Proffer of Evidence) and responded as early as their job-seeking Proposal of July 9, 1993 (Exhibit I to Complaint). It states in paragraph 3, Statement of Qualifications that TNC "negotiated... contracts ... 79.5% of the fair market value," that it was "experience in contracting for appropriate boundary mapping, surveys, environmental audits and appraisals" and that it "can assess the methodology employed by these professionals and its compliance with the standards required. . ." Id., P.5 Furthermore, TNC and the County's actions in concert with each other to

perform the contract and implement the Plan is also evidence of their understanding.

Regarding Judd, the evidence shows that Judd and his co-defendants reached an understanding to violate F&G's rights through the training of Judd to perform the Brevard County/TNC contract and his voluntary undertaking to do so. Specifically, Judd set the land prices and negotiated the acquisitions with landowners, telling them it was a "one-time only offer" and that funds were "limited." Then, Judd boasted of his success in acquiring the taken land for substantially less than fair market value.

Finally, insofar as they apply, Plaintiff incorporates its argument below regarding proof of civil conspiracy. Thus, for all of the foregoing reasons, the dismissal of the S 1983 conspiracy claim should be reversed.

* * *

B. F&G's federal takings, due process, and equal protection claims are ripe because the state procedure for obtaining just compensation is not adequate. (P. 46)

If the procedure the government provides for obtaining just compensation for a government taking is inadequate, then the plaintiff's Fifth Amendment takings, due process, and equal protection claims are ripe even if the plaintiff has not completed the process provided by the state. Agripost, Inc., 1999 WL 1032608. In this case, there are several reasons why the state procedure is inadequate and the plaintiff's § 1983 claims are ripe. Most importantly, the state claim for inverse condemnation can be made only against a government entity. However, § 1983 provides that a private entity (here TNC and Judd), can be sued for taking without just compensation if the

private entity is a state actor. Thus, the Florida state procedures offer no remedy to F&G against TNC and Judd for the taking. This becomes especially important because TNC and Judd can be liable for punitive damages as private parties, while the County cannot be required to pay punitive damages. Thus, the Florida state procedures are inadequate in this case because F&G is precluded from suing two defendants and is precluded from an entire category of potential damages.

Furthermore, the United States Supreme Court has recently decided that a plaintiff in a takings claim has a constitutional right to have that claim determined by a jury. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 1638 (1999). The Seventh Amendment right to a jury trial does not apply to the states, id.; thus, a plaintiff in a claim for inverse condemnation in Florida is not entitled to a jury trial under Florida law. A plaintiff who is required to seek relief only based on state inverse condemnation claims will not be able to have a jury determine whether a taking occurred; therefore, the state procedures are inadequate and F&G's claims are ripe.

Moreover, the Florida state claim for inverse condemnation is inadequate because the measure of damages is different than in a federal takings claim. Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992). Federal takings law requires compensation for decreased utility, while Florida inverse condemnation law does not. Id. The Florida cause of action for inverse condemnation requires proof that the property has actually decreased in value, while a federal takings claim under § 1983 requires only a showing that a difference in the market value of the property existed

because of the government's actions. Id.
Thus, because the measure and proof of damages in a state inverse condemnation claim differs from the measure and proof of damages in a federal inverse condemnation claim, the state inverse condemnation procedure is inadequate and F&G's federal claims are ripe.

Thus, F&G's § 1983 claims are ripe because the Florida inverse condemnation procedure is inadequate in that it does not provide a remedy against two defendants, F&G is precluded from any claim for punitive damages, F&G will not be able to obtain a jury trial in the state inverse condemnation claim, and the measure and proof of damages differs between a state inverse condemnation claim and federal takings claims.

Finally, if this Court does determine that F&G's federal claims are not ripe, then F&G should be allowed to make its Jennings reservation in the trial court as that will be the first time it will have been able to do so.

Excerpts from Petitioner's Initial Brief to the Fifth DCA in Appeal Number 00-649

II. THE TRIAL COURT ERRED IN DISMISSING THE EQUAL PROTECTION COUNT IN THE ROAD SUIT. (P. 20)

F&G adequately alleged and produced evidence to allow F&G to survive a motion to dismiss regarding its Equal Protection claim; and, as discussed in Section IV below, should have been allowed to try that claim before a jury. The Equal Protection claim is Count V of the Complaint in the "Road Suit," Case No. 96-4509 CAD,

and was dismissed by the trial court.[1] The only two bases for the trial court's dismissal of all counts that it dismissed in the Road Suit were that the property had "viable economic use and value" and that "real doubt is cast upon whether Plaintiff's asserted Claim is 'ripe.'"

The Equal Protection claim was properly alleged and could have been proven at trial because the issue was ripe and because the existence of some economic use or value does not preclude the claim. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1074-75 (2000) (internal quotations and citation omitted, recognizing successful equal protection claims brought by a "class of one"). A regulation is invalid and will not be sustained if the classification drawn by the statute is not rationally related to a legitimate state interest. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Executive 100, Inc., v. Martin County, 922 F.2d 1536, 1540 (11th Cir. 1991) (holding that a plaintiff may claim an Equal Protection violation when the regulation creates a classification that involves the exercise of a fundamental right); Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990) (recognizing both facial and as-applied Equal

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[1]Because the Equal Protection claim was dismissed on a motion to dismiss, the trial court is not entitled to any deference, and this Court should review the matter de novo, taking all facts and reasonable inferences in favor of F&G. Hearndon v. Graham, 2000 WL 1288688 2 (Fla. Sept. 14, 2000).

Protection violations for landowners). To state a claim for a violation of the constitutional right to Equal Protection under the law, a plaintiff must allege that it was treated differently than similarly situated people. Olech, 120 S. Ct. 1073, 1074-75. When the challenged classification involves the exercise of a fundamental constitutional right, the court must examine the classification with strict scrutiny, and the classification must be narrowly tailored to serve a compelling state interest. In re Estate of Greenberg, 390 So. 2d 40, 42-43 (Fla. 1980) (citing Roe v. Wade, 410 U.S. 113 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); and Skinner v. Oklahoma, 316 U.S. 535 (1942)). "This test, which is almost always fatal in its application, imposes a heavy burden of justification upon the state and applies only when the statute operates to the disadvantage of some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution." Id. The fundamental rights that are entitled to strict scrutiny analysis are those rights explicitly or implicitly guaranteed by the constitution. Id. As the right to hold property is explicitly delineated in the Constitution, it is a fundamental right entitled to strict scrutiny analysis for equal protection purposes. Here, F&G stated a claim under the Equal Protection clause because Defendants' actions had affected the economic use and value of the property at the time the claim was made; and, as described below, the County's actions (and TNC's actions as co-conspirator and state actor) against F&G bear no rational relationship to a legitimate governmental interest, much less meeting the

standards required by strict scrutiny analysis of being narrowly tailored to serve a compelling state interest.

Whether F&G's property retained some economic use and value is irrelevant under Equal Protection analysis because, inter alia, "the establishment of a constitutionally protectible property interest is wholly irrelevant to an equal protection claim. . . . An equal protection claim revolves around whether similarly situated persons are treated differently." The Reserve, Ltd., v. Town of Longboat Key, 17 F.3d 1374, 1381 (11th Cir. 1994) (citing City of Cleburne, 473 U.S. at 439). Here, in addition to asserting constitutionally protected fundamental rights, Farm & Grove adduces substantial record evidence that it is being treated differently from similarly situated property owners as a "class of one." As compared to other landowners situated in the Valkaria and Ten-Mile Ridge Refugia areas, the County and TNC treated F&G differently when, for instance, Defendants used the improper "bulk sale" appraisal method for F&G lots, imposed unreasonable delays in approving F&G's applications for permits, required F&G to irrationally engineer roadways and swales that would improperly divert storm-water runoff away from drainage ditches, and deliberately delayed land purchase negotiations with F&G in an attempt to force sales of F&G's lots at distress prices -- all actions by Defendants against F&G only.

Regarding the class consisting of F&G and those other (similarly situated) property owners within the Refugia areas, vis-a-vis the property owners outside of the Refugia areas, F&G raised an issue of material fact as to whether F&G and the other in-Refugia owners were denied Equal Protection when Defendants waived all road

requirements for similar rural/acreage lots in West Canaveral Groves, an area of Brevard County strikingly similar to Cape Kennedy Estates in all relevant ways. Also, the County created the Valkaria Grant Stormwater District, which had different drainage standards than any other part of Brevard County, and was based on the boarders of CKE and not based on any rational engineering or other reason.

Also, substantial evidence would allow a jury to find that the in-Refugia class was denied its Equal Protection rights when Defendants diverged from statutory land valuation, quantification, and qualification standards. For instance, Defendants improperly denied F&G and its class credit for all of the land area of easements; appraised property on a per-lot basis, rather than on an acreage basis; and, used non-economic comparable sales in appraising land values.

Insofar as F&G is a member of the class of property owners of property more than 1320 feet from a county paved road, as opposed to owners of property less than 1320 feet from a county paved road, F&G is a member of that class that cannot build any road under the ordinances. Moreover, the County's irrational system, enacted after the sale of all CKE lots in 1968-72 to many hundreds of different owners across the globe, requires that a road must be in place before a building permit will be issued to build a house, but a house must be in place before a MSBU can be used to fund the economically feasible and equitable road construction, creating a Catch-22 that effectively prevents both road and house construction by F&G and its class of property owners more than 1320 feet from a county-maintained, paved road.

Additionally, F&G is a member of the class of

owners of property less than 1320 feet from a county-maintained, paved road where housing does not exist, as opposed to owners of property less than 1320 feet from a county-maintained, paved road where housing does exist. F&G's class is inordinately burdened by the road ordinances requiring the class to bear of costs of road construction without any equitable contribution from adjacent landowners who thereby enjoy windfall benefits from F&G's bearing of the entire cost of the road construction. The evidence clearly shows that the County has no rational basis to prevent the equitable contribution.

Furthermore, even if the ordinances at issue were facially neutral, the ordinances deny Farm & Grove its Equal Protection rights because evidence shows that the ordinances were applied to Farm & Grove with discriminatory animus. "[T]o prevail on a claim that defendant unequally applied a facially neutral statute, a plaintiff must show intentional discrimination. E & T Realty v. Strickland, 830 F.2d 1107, 1112 (11th Cir. 1987)." The Reserve, Ltd., 17 F.3d at 1381 (finding that evidence of prior unrelated civic disputes and activism by plaintiff corporation's principal could prove requisite animus); see also Olech v. Village of Willowbrook, 160 F.3d 386 (7th Cir. 1998) (finding that allegation of prior litigation between parties stated requisite ill will). Here, the acts suffered by F&G as described above, particularly as a "class of one", are evidence of such animus. Also, evidence was adduced regarding Mr. Edward Tietig's (F&G's President and owner) prior disputes, in his capacity as chairman of the Grant Drainage District, regarding dedications of roads and similar matters; and, to take autonomy away from Mr. Tietig, the Grant Drainage

District was subsequently metamorphosed by the County into a drainage district under Brevard County's control that irrationally contained parts of several different watersheds, and did not include the complete watershed for any one watershed. Moreover, Brevard County enacted what is essentially a bill of attainder against Mr. Tietig that changed the voting for a MSBU from a one-vote-per-lot basis to a one-vote-per-landowner basis, thereby negating Mr. Tietig's majority status on the relevant roadway and affecting no other landowner in a like manner.

The County later gave two justifications for its actions: protection of the scrub jay and prevention of urban sprawl. However, F&G adduced evidenced that the County's actions were not rationally related to its justifications and that the real motive was to obtain the property in the scrub habitat at less than market value by forcing F&G to sell, and this allegation should have gone to the jury for determination.

A. <u>The County's intent to avoid paying fair market value for core lots.</u>

First, the County has evidenced a strong intent to avoid paying fair market value for the core lots. The County received federal grants for $300,000 to develop the Scrub Conservation Development Plan (SCDP), which is the plan that first delineated the core areas. (TT 345; 549.) However, when the SCDP was actually presented to the County, the County's attorney warned that officially adopting the plan could require the County to pay for the lots. (P's Ex. 40.) In fact, the SCDP prohibited owners of core lots from building on those lots, without any mitigation option, and these owners would be paid fair market value for their property. (P's Ex. 41; TT 352.) So,

rather than officially adopting the plan and paying the property owners fair market value, the County sent the SCDP to the EEL program with instructions to begin implementing the plan by purchasing the lots designated as core areas. (P's Ex. 40.) Ann Birch, the director of the EEL program testified that it was her goal to purchase all of the lots in the core areas (TT 452, 451), and Lori Thoms, TNC's acquisition agent testified that it is her job to purchase all of the lots in the core areas. (TT 458) Additionally, the County hired TNC as its acquisition agent. (P's Ex. 38, 39.) During the bidding process for the contract that was eventually awarded to TNC, County Commissioner O'Brien stated that he wanted an acquisition agent who was "meaner than a junkyard dog" so that the County could acquire the lots as cheaply as possible. (TT 354.) In fact, TNC's application and performance reports boast that TNC is successful in acquiring conservation property at less than fair market value. (P's Ex. 38, 39.) In its application to the County, TNC gives the example that it was able to purchase property in Brevard County known as "The Enchanted Forest" on the courthouse steps for only $100 over the mortgage by refusing to negotiate with the property owner, knowing the property owner was in financial dire straits. (P's Ex. 39.) The application explains that TNC waited until the mortgagee foreclosed on the property, made a private arrangement with the mortgagee prior to the foreclosure sale, and purchased the property for $100 over the loan balance. (P's Ex. 39.) Thus, the County's intent to pay less than fair market value for the lots is clear.

B. <u>The County's attempts to force F&G to sell for less than fair market value.</u>

Not only was the County's true goal to obtain the core lots for less than fair market value, a reasonable jury could infer that the County also sought to force F&G to sell its lots for less than fair market value.

1. **Intimidating sales tactics to deflate market**

First, in the spring of 1994, the County sent out a letter to all property owners in the core area that the County intended to buy the property for conservation purposes. This served to artificially deflate the market because individual buyers were immediately wary of purchasing lots in a land designated for the County's conservation purposes. Moreover, TNC sent letters telling property owners that funds were limited, and they would be making a one-time offer on the property. This served to intimidate lot owners into selling to the County for whatever TNC offered for fear that the property could no longer be used because it was designated to be purchased for conservation, that no one else would want to purchase the property, that the County would never make another offer, and that the property owner would be left with worthless property that they could never sell (which is an admission of what Defendants did to F&G).

2. **Regulatory methods of decreasing value of lots and slowing development**

At the same time the County began its purchasing efforts in earnest, the County began passing ordinances to further deflate the market and to slow development in the core areas. The County showed its intent to use its regulatory powers to help it obtain its conservation goals in the land acquisition manual for the EEL program. The manual stated, "The County's policy is to purchase land when other means, such as zoning or regulation, are not

appropriate, available, or effective to achieve the program's conservation goals and objectives." Assistant County Manager Steven Peffer also stated that their were mechanisms to address environmental concerns without purchasing the land. The manual also stated, "Zoning can be used to provide some measure of protection to both Natural Resources and property values." Thus, it was the County's policy to use zoning and regulation to meet its conservation goals, which included the deflation of the market so that the County could purchase lots for less than fair market value.

The County first changed the ordinance that provided for an MSBU for equitable contributions to build roads by increasing the requirement for participation from 50% to 75%. Then, when it became evident that the MSBU ordinance would be used to build roads even at that rate because Mr. Tietig, through F&G's sister company, Villa Sol, had attempted to assemble lots, the County altered the ordinance so that no matter how many lots a property owner owned, the owner got one vote in the MSBU participation calculation; however, that owner was still assessed under the MSBU for each lot owned. This blatant animus toward Mr. Tietig & F&G is evidenced by the County's admission that this policy changed at the same meeting in which Mr. Tietig, on behalf of Villa Sol, requested an MSBU for roads with a per-lot participation ratio of 91%. After the ordinance was changed, F&G and Villa Sol could not obtain a 75% participation rate because Mr. Tietig's companies were allowed only one vote even though they owned a large majority of the affected lots.

The County also passed a resolution that allowed the MSBU ordinance to be used for roads only in areas

where houses already existed. This created a catch 22 for core lot owners because an owner could not obtain a building permit unless there was a road, and the owner could not get the road unless more than half of the lots on the road were already permitted.

In addition to the elimination of the MSBU ordinance for paved roads in CKE, the County required that a dirt road be put in before a building permit could be granted; however, the maximum length of the dirt road was 1320 feet. Thus, owners more than 1320 feet from an existing County-maintained, paved road could not build at all, and owners less than 1320 feet from an existing County-maintained paved road could not built unless they first paid for and installed a County-approved dirt road. The unpaved road ordinance had no provision for equitable contribution, so the individual property owner was required to bear the entire cost of the road, which made building the road economically unfeasible unless eight or more of the ten lots could be assembled by one owner. The County knew that this was very unlikely because the lots had originally been sold to diverse buyers, most of whom lived outside of the state. So, between the changes in the MSBU ordinance for paved roads, and the refusal to include an MSBU or other mechanism for equitable contribution for unpaved roads, the County knew that the CKE lots (and, therefore, the core lots) were unlikely to develop, and the County could take its time purchasing the lots that were now essentially worthless in the private market.

3. **Using permitting delays to place economic pressure on F&G to sell for less than fair market value.**

In 1994, when it became clear to F&G that it would not be able to sell its lots in the core because the lots did not abut previously existing County-maintained paved roads, F&G was forced to try to build some roads just to survive. When F&G put in applications for the roads, the County delayed the process far beyond when it would have approved permits for other (similarly situated) applicants. No justification was given for the delays. Also, the County created engineering standards for F&G's roads that were unfeasible, impractical, and irrational from an engineering point of view. F&G's expert engineer testified that these standards were much higher than any other standards he had seen for unpaved roads in previous permit applications with the County for other applicants. The engineer also testified that it took two to two-and-one-half years to get the road permits for F&G when normally those permits took an average of 60 days for him to obtain for applicants other than F&G. In fact, the engineer testified that during the same time frame, he obtained unpaved road permits for the County in two weeks.

The County also artificially increased road standards only in the CKE area by creating the Valkaria Grant Stormwater District. F&G's engineer testified that the boundaries of this new stormwater district were virtually identical to the boundaries of CKE. The engineer also testified that these boundaries made little sense from an engineering perspective because they included portions of four separate basins, but of those four basins, the boundaries included only one relatively complete basin. Thus, those boundaries were created so that the County could impose stricter road permitting standards that applied only to the CKE area, which is where the two core

areas of scrub habitat were located.

4. Making lots dangerous, inaccessible, and physically unattractive

In addition to regulatory activities to make the lots unattractive to potential purchasers, the County also implemented methods to make the lots dangerous, inaccessible, and physically unattractive. First, the County made the lots difficult for potential purchasers to see by blocking physical access. The County erected fences, gates, ditches and berms blocking physical access to the County's lots, and, thus, to the easements and rights of way that would allow potential purchasers to get to lots for sale. Additionally, the County posted no trespassing signs on the fences blocking the easements and rights of way so that potential purchasers would be afraid to cross County property to get to lots for potential purchase.

The County also made the lots physically unappealing by clearcutting County owned property, decreasing the natural beauty of the areas in view of non-County property that might be for sale. Furthermore, the County entered into and published a CARL contract, which explains that controlled burns are required for management of conservation areas. With the recent history of out-of-control burns, the prospect of having "controlled burns" on adjacent property made potential purchasers reluctant to purchase in or near the core area.

5. Attempting to force sale for below market value through improper valuation methods.

First, the County obtained appraisals using invalid valuation methods. Rather than using the more than 600 sales by F&G or other open market transactions as comparable sales for the appraisal, the appraisals used 5 lot

sales made to the County for conservation purposes. This practice was specifically and statutorily banned by federal appraisal standards (USPAP) as supplemented by Florida Supplemental Standards. (Monograph, Exhibit H to Complaint.) These standards, which, under Florida law, (§§ 475.615 (4), 475.624(14) Fla. Stat.), must be followed, were ignored, despite specific language in the County's contract with the State of Florida that confirmed this requirement. (Exhibit E to Complaint.)

Next, contrary to USPAP standards, the County based their appraisals on a per acre basis, despite the local practice of sales on a per lot basis rather than a per acre basis. Also, the appraisals discounted for road easements that the County knew would not devalue the property if the property was to be used for conservation purposes because the roads would never be built.

Moreover, the County based its Master Appraisal Survey on the federal definition of wetlands, which is more expansive than the State of Florida's statutorily required definition. Thus, more lots were devalued as wetlands than were actually defined as wetlands in the state definition, violating Rule 62-340.100 F.A.C. requiring these types of appraisals to use the Florida state definition of wetlands. Thus, the property was inappropriately devalued as wetlands.

Based on all of this evidence, a reasonable jury could find that the County's true motivation was not to protect scrub jays or to prevent urban sprawl, but to obtain the core property for less than fair market value.

C. <u>The County's actions that are inconsistent with its purported goals of protecting the scrub jay and preventing urban sprawl.</u>

If the County's actions were truly motivated by the goal of protecting the scrub jay, the County would have been required to obtain all of the property in the core areas. The SCDP was to be used to mitigate for the development of scrub habitat in other parts of the County. In order to meet the goal of ensuring the survival of the scrub jay in Brevard County, the SCDP required the core areas to be undeveloped so that the remaining scrub habitat in the County could be developed outside of the core areas, which was less desirable scrub habitat than the core areas. However, in order for the SCDP to meet its goal of actually ensuring the survival of the species, the County would have to actually control the entire core areas and prevent those areas from developing. Thus, if the County's goal was truly to save the scrub jay, it would have either immediately halted all development in the core areas or limited development of all scrub habitat in the County, whether within or outside of the core areas. However, instead of doing this, the County continued to allow all scrub habitat in the County to develop, including the core and non-core areas of scrub habitat throughout the County. As shown in the discussion above, the reason the County did not immediately stop all development in the core areas was to avoid having to pay fair market value for the lots in the core.

With respect to the prevention of urban sprawl, the County could not have been very concerned about this issue because the County allowed the area of West Canaveral Groves to develop in contravention of every method of preventing urban sprawl. For example, the roads in West Canaveral Groves do not comply with County requirements for roads in the CKE area. The

buildings in the West Canaveral Groves area do not comply with County building codes, and they have not been permitted. There is no infrastructure for the provision of water to residents of West Canaveral Groves. The only excuse the County can give for West Canaveral Groves to be allowed to develop in contravention to these urban sprawl issues is that it just happened without the County knowing about it. However, Assistant County Manager Peggy Busacca testified that when the County first learned of the problems in West Canaveral Groves there were probably 30 units built. (TT 535) Now, West Canaveral Groves is still not in compliance with what the County claims are urban sprawl prevention ordinances, and the number of families Ms. Busacca estimates live there has grown to approximately 100. (TT 486-489.) Thus, the County has known about the West Canaveral Groves development in contravention to urban sprawl prevention policies, but the County has allowed the development to continue.

Perhaps the most telling evidence that the road ordinances were not changed to deal with urban sprawl issues is the timing of the enactment of the various ordinances. Ms. Busacca testified that the County was informed by the State of Florida that the County's development policies were deficient in preventing urban sprawl. However, the County did not enact the unpaved road ordinance 1320 foot distance limitation until November of 1993. (93-27) The 1991 unpaved road ordinance did not include any distance limitation. (91-08). Moreover the 1991 unpaved road ordinance allowed for no-maintenance agreements, which would relieve the County of the responsibility of maintaining unpaved roads.

Because these unpaved roads with no-maintenance agreements were not maintained by the County, it seems likely that the quality of those unpaved roads would quickly decline. Thus, the 1991 unpaved road ordinance was not likely to prevent urban sprawl. Rather, it provided a mechanism to assist in the creation of roads in undeveloped or newly developed areas that could easily deteriorate without maintenance required by the County.

Even more telling is the adoption of the MSBU ordinance in July of 1991 (91-12), which provided for the first time that paved roads could be funded through an MSBU. If the County were truly worried about urban sprawl in 1991 when it enacted the unpaved road ordinance, it would not have provided a mechanism to make the building of new roads easier. If prevention of urban sprawl were the reason for the elimination of the MSBU in 1994, then the County never would have enacted the ordinance in 1991, three years after the State had informed the County of its urban sprawl problems. Thus, based on the timing admitted to by the County, it seems unlikely that the County's purpose in eliminating the MSBU in 1994 and enacting the distance limitation on unpaved roads in November of 1993 had anything to do with the prevention of urban sprawl. More likely, the changes in the ordinances had to do with the event contemporaneously occurring in the County, which was the beginning of the County's attempt to acquire the lots in the core for less than fair market value, particularly as the two main undeveloped areas remaining in the County at that time were CKE and West Canaveral Groves. Because West Canaveral Groves had special allowances with respect to development requirements, the County could safely

enact these development restrictions because the only area really impacted by the changes was CKE, where the County wanted all development to stop in the core areas.

Also, evidence showed that the County allowed development of land on the far side of CKE, more remote from public services and infrastructure than CKE lots. Thus, F&G was not provided equal protection under the law, and the classification of F&G was not rationally related to any legitimate County interest. Thus, this Court should reverse the trial court's dismissal of the Equal Protection Count and allow the claim to proceed to the jury.